

Cooper



**Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** MiniMed Technologies, Ltd.

**File:** B-239023

**Date:** July 20, 1990

Alan Dickson, Esq., and Linda T. Maramba, Esq., Jones, Day, Reavis & Pogue, for the protester.  
S.J. Evans, National Aeronautics and Space Administration, for the agency.  
Sabina K. Cooper, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest challenging evaluation of protester's proposal is denied where solicitation's technical and cost criteria were of essentially equal importance; the contracting agency's cost realism and technical approach analysis were reasonably based; and the awardee offered the proposal with the highest technical rating and the lowest probable cost.

### DECISION

MiniMed Technologies, Ltd. protests the award of a contract to Life Systems, Inc. under request for proposals (RFP) No. 5-86176/238, issued by the National Aeronautics and Space Administration's (NASA's) Goddard Space Flight Center for the design and manufacture of Functional Electrical Stimulation (FES) systems, implantable devices using electricity to restore function to paralyzed muscles. MiniMed argues that NASA failed to properly apply the evaluation criteria to the offers it submitted under the RFP.

We deny the protest.

The RFP, issued January 13, 1989, requested offers for 200 implantable stimulator receivers and 160 external control units for FES systems to be used in animal and clinical research for the restoration of paralyzed muscles. The RFP required that proposals be based upon award of a cost-plus-fixed-fee contract, with delivery of the devices within 48 months of contract award. The RFP also provided that alternate proposals as well as basic proposals would be

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considered. The RFP further stated that four factors, in the following order of importance, would be considered in evaluating offerors' proposals: mission suitability; cost/price; relevant experience and past performance; and other factors. Mission suitability and cost/price were described as of essentially equal importance, but more important than the last two factors, which were also described as of essentially equal importance.

Four offerors, including MiniMed and Life Systems, submitted proposals. In addition to a basic proposal based on award of a cost-plus-fixed-fee contract and a 48-month delivery schedule as called for by the RFP, MiniMed submitted three alternate proposals. The alternate proposals were based on award of a cost-plus-fixed-fee contract with an accelerated delivery schedule of 30 months; award of a fixed-price contract with a 48-month delivery schedule; and award of a fixed-price contract with the accelerated 30-month delivery schedule.

NASA included all four offerors, including MiniMed, in the competitive range and conducted written discussions. Based on the best and final offers (BAFOs) submitted by the offerors at the conclusion of discussions, Life Systems and MiniMed were rated as essentially equal under the evaluation criteria for mission suitability, and experience and past performance; Life Systems received a higher overall rating in the "other factors" criterion; and Life Systems' proposed costs were significantly lower than MiniMed's. Based on this evaluation, NASA selected Life Systems for award as offering the proposal most advantageous to the government.

MiniMed challenges NASA's decision to reject its proposals, arguing that the agency failed to adequately consider the cost advantages derived from MiniMed's experience with developing devices similar to those called for by the RFP. Specifically, MiniMed states that for some time it has been involved in developing a family of neurostimulator devices; the first version is called the Clarion cochlear stimulation system, an implantable device to restore hearing in the profoundly deaf. According to MiniMed, it has developed other applications of the device, including the family of devices known as "Pulsar," described as neural electrical stimulators of general electrostimulation application. MiniMed maintains that its experience with development of these devices gave it a significant advantage in the work called for by the RFP, since it has already accomplished the major developmental tasks required for the FES systems. MiniMed contends, however, that NASA failed to recognize the cost advantages derived from this experience in evaluating

MiniMed's proposal. MiniMed also argues that NASA failed to consider the cost benefits to the government of the fixed price and accelerated delivery schedule options proposed in MiniMed's alternate proposals.

In reviewing protests of allegedly improper evaluations, our Office will not substitute its judgment for that of the agency's evaluators, but rather will examine the record to determine whether the evaluators' judgments were reasonable and in accord with the listed criteria and whether there were any violations of procurement statutes and regulations. Dalfi, Inc., B-224248, Jan. 7, 1987, 87-1 CPD ¶ 24.

Moreover, because the agency is in the best position to assess cost realism and must bear the difficulties or additional expenses resulting from a defective cost analysis, our review of the agency's cost analyses focuses on whether the evaluation was reasonably based. OptiMetrics, Inc.; NU-TEK Precision Optical Corp., B-235646, B-235646.2, Sept. 22, 1989, 89-2 CPD ¶ 266.

MiniMed essentially argues that NASA failed to take into account the substantial investment MiniMed has made in developing related devices, and thus erred in its analysis of MiniMed's proposed costs relative to other offerors.

As a preliminary matter, the record clearly shows that NASA took MiniMed's experience with similar devices into account in its technical evaluation of MiniMed's proposal.<sup>1/</sup> Although MiniMed's technical proposal was found to be excellent, it proposed a complex design, which, while meeting all the requirements of the RFP, did so at a significantly higher cost than did Life Systems. MiniMed's prior experience with similar devices, standing alone, simply is not enough to show that NASA improperly evaluated

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<sup>1/</sup> NASA evaluated MiniMed's previous experience under the experience and past performance criterion, which included experience in related previous or current work; technical, schedule and cost performance for related efforts; and specific contract and subcontract information. NASA evaluated MiniMed on the experience portion of the factor only, since MiniMed did not have any specific contract or subcontract experience, as its prior work had been done in-house. Despite MiniMed's lack of previous contracts, its rating for the composite experience and past performance criterion was comparable to the other offerors, and thus was not the basis for the rejection of its proposal.

its proposal or improperly determined that Life Systems' approach was technically equal.<sup>2/</sup>

With regard to NASA's cost realism analysis, while MiniMed asserts that "references to any consideration of the cost advantages (or disadvantages) of MiniMed's advanced technology are conspicuously absent from NASA's source selection documentation," MiniMed does not explain what further consideration of its alleged cost advantages was required or how such consideration would have changed the outcome of the evaluation. In fact, the record indicates that NASA accepted MiniMed's proposed costs as realistic, without adjustment, in effect agreeing that the proposed costs would be as MiniMed projected. NASA's cost realism analysis of MiniMed's proposal thus was as favorable as it could have been.

To the extent that MiniMed suggests that in performing the contract Life Systems will have to make an investment equivalent to the amounts MiniMed has expended in connection with its development of similar devices, and thus that these sums should be added to Life Systems' proposed costs, we fail to see any basis for such a conclusion. On the contrary, the record shows that the agency performed a thorough cost realism analysis of Life Systems' offer which showed that its costs were within the government estimate for the work and subsequently lower than the costs proposed by Life Systems.

NASA had formulated an in-house estimate prior to release of the RFP that represented NASA's best approximation of the resources necessary for the FES effort. MiniMed's proposal far exceeded NASA's estimate. Although MiniMed's proposed costs were considered reasonable for its proposed approach, and its technical proposal was adjudged to be excellent, MiniMed proposed a complex design which met all the requirements of the RFP, at a significantly higher cost than Life Systems' proposal, which NASA also adjudged to be excellent technically. Accordingly, since Life Systems' and MiniMed's offers were considered to be almost equal with respect to the mission suitability factor (with Life Systems scoring slightly higher), the total probable cost to the government under the cost/price factor properly became the determinative selection criterion because the two factors were of essentially equal importance. In essence, Life Systems offered NASA the best technical proposal at the lowest estimated cost.

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<sup>2/</sup> In fact, NASA rated Life Systems' technical approach slightly higher than MiniMed's.

MiniMed's second contention concerns NASA's alleged failure to evaluate the firm's three alternate offers: the fixed-price, 48-month delivery offer; and the cost-type and fixed-price 30-month delivery schedule offers. Our review of the record confirms NASA's assertion that it evaluated all of MiniMed's offers.

With respect to MiniMed's fixed-price offers, in its determination and findings supporting use of a cost-plus-fixed-fee contract, NASA reasonably determined that because the RFP was for the design, development, fabrication, test, and manufacturing of an FES, the exact nature and the extent of the effort required would be subject to change as the work progressed, and the cost of such work could not be predicted with sufficient accuracy to establish a fixed price. Accordingly, NASA properly decided that the contract type should provide a flexibility consistent with the nature of the work to be done, because of the absence of precise specifications, while providing the best possible support, and allowing for appropriate government monitoring that would give reasonable assurance that inefficient or wasteful methods are not being used. See Federal Acquisition Regulation (FAR) §§ 16.301-c(c) and 35.006 (expressing a preference for cost-reimbursement contracts for efforts involving research and development). NASA also took into account the poor financial condition of the firm, which indicated that MiniMed might not be able to finance a fixed-price contract, and the fact that MiniMed's price was considerably higher than both the government estimate and the probable cost of Life Systems' proposal.

Under these circumstances, given the type of work called for by the RFP and the fact that NASA was concerned about MiniMed's financial condition, we see no basis to object to NASA's conclusion that acceptance of MiniMed's fixed-price offer was not in the government's best interest.

With respect to MiniMed's accelerated 30-month delivery schedule proposals, we find that NASA fully considered them and reasonably decided to reject them. NASA determined that early delivery was not acceptable since full funding for the project was not expected to be available in 30 months. NASA also concluded that a change in a material element of the RFP, such as the delivery schedule, would require a revision of the RFP to allow all offerors the opportunity to compete on an equal basis. In addition, NASA found that the savings in administrative expenditures which MiniMed asserts would result from an accelerated delivery schedule were purely speculative and could not be predicted with any reasonable degree of accuracy.

Accordingly, we find that NASA properly evaluated all of MiniMed's proposals and that NASA's decision to select Life Systems was reasonable and consistent with the RFP's evaluation scheme, in that Life Systems was the offeror with the highest technical rating and the lowest probable cost.

The protest is denied.

*for Robert T. Murphy*  
James F. Hinchman  
General Counsel